

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

SECTION 257 PROCEEDING TO
IDENTIFY AND ELIMINATE
MARKET ENTRY BARRIERS FOR
SMALL BUSINESSES

GN Docket No. 96-113

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To: The Commission

COMMENTS OF METRICOM, INC.

Metricom, Inc. ("Metricom"), pursuant to Section 1.415 of the Commission's rules, by its attorneys, hereby submits these Comments in response to the Commission's Notice of Inquiry in the above-referenced proceeding (the "Notice").^{1/} The Notice seeks information on market entry barriers for small businesses in the provision and ownership of telecommunications and information services and requests comments on ways to eliminate these barriers.

^{1/} These Comments are timely filed in accordance with the two extensions of time granted by the Commission for filing comments in this proceeding. See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Order (rel. July 9, 1996); Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Order (rel. Aug. 23, 1996).

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I. Introduction

Metricom is a young, rapidly expanding, technologically innovative company based in Silicon Valley. Metricom is a pioneer in the development of state-of-the-art, spread spectrum, unlicensed data communications systems operating under Part 15 of the Commission's rules and regulations. Metricom is also a relatively small company by communications industry standards, with calendar year 1995 revenues of approximately \$10 million.

In the Notice, the Commission seeks recommendations on how it should define small businesses -- "[b]y number of employees, gross revenue, net revenue, assets, or any other factor"^{2/} -- and whether the Commission should adopt one standard for all services.^{3/} Metricom recommends that the Commission extend the rule adopted in the PCS C-Block proceeding pertaining to publicly traded corporations' eligibility for small business status to all services.^{4/}

II. The Commission Should Apply the Standard for Publicly Held Corporations Used for PCS C-Block Applicants to All Services.

The rules *initially* adopted by the Commission governing the PCS C-Block auction provided that an applicant, including a publicly traded corporation, could qualify as a small business if

^{2/} Notice at ¶ 40.

^{3/} *Id.*

^{4/} See *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 444 (1994) ("*Fifth Memorandum Opinion and Order*"). See also 47 C.F.R. § 24.720(m) (1995).

the applicant's annual revenues, including the revenues of all "attributable investors and affiliates," for the preceding three years did not exceed \$40 million.^{5/}

Consistent with the Small Business Administration's ("SBA's") rules, the *Fifth Report and Order* also provided that, in determining an applicant's eligibility for small business status, the applicant must aggregate with its own revenues and assets the revenues and assets of its "affiliates."^{6/}

In addition to the "affiliation rule," the Commission initially adopted an attribution rule which provided, subject to four specific exceptions, that an applicant must aggregate with its own revenues and assets the revenues and assets of all persons that hold interests in the applicant, whether or not such persons are affiliates of the applicant.^{7/} Three of these exceptions required a corporate applicant to identify a "control group" of shareholders who hold in aggregate at least 50.1% of the company's voting interest.^{8/} The remaining exception pertains to a consortium of small businesses and is not

^{5/} *Id.*; Fifth Report and Order, 9 FCC Rcd 5532, 5608 (1994) ("*Fifth Report and Order*").

^{6/} 47 C.F.R. § 24.709(a)(1) (1994). Two parties are "affiliates" of one another when one controls or has the power to control the other, both are controlled by the same third party, or there exists an "identity of interest" between the parties. 47 C.F.R. § 24.702(1)(1) (1995).

^{7/} 47 C.F.R. § 24.709(b)(1) (1994).

^{8/} 47 C.F.R. § 24.709(b)(4) (1994).

applicable to these Comments.^{9/}

The Commission adopted these rules because it feared that large companies would use small companies as "fronts" to take advantage of the benefits granted to small businesses by the Commission, thereby defeating the purpose of these benefits.^{10/} The rules had unintended effects.

As a practical matter, the "attribution rule" caused thousands of publicly traded corporations to be ineligible for small business status because of their inability to identify a control group. Consequently, in October 1994, Metricom met with Commission personnel to recommend an alternative to the Commission's attribution and affiliation rules for publicly traded corporations. Specifically, Metricom recommended that the Commission adopt a rule that, for purposes of determining eligibility for small business status, would recognize the existence of a *bona fide* alternative to the presence of a "control group" of shareholders where: (1) a publicly traded corporation's voting stock is truly dispersed (*i.e.*, where no person or group of persons acting in concert holds more than 15% of the voting power of the corporation) and *de facto* control resides in management.

The Commission adopted Metricom's proposal, noting that:

[A] significant number of small, publicly-traded companies have such widely dispersed voting stock ownership that no identifiable control group exists or

^{9/} 47 C.F.R. § 24.709(b)(1) (1995).

^{10/} See, e.g., *Fifth Report and Order*, 9 FCC Rcd at 5619.

can be created. Without a control group, such companies may not be able to bid for entrepreneurs' block licenses or qualify for small business status even though their gross revenues and assets meet our financial caps. It was not the Commission's intent that these companies be denied the opportunity to bid on the entrepreneurs' block, or to qualify for treatment as a small business.^{11/}

Metricom encourages the Commission to continue this policy and extend the provisions contained in Sections 24.709(b)(2) and 24.720(m) of the Commission's rules to all services.

Under Section 24.720(m), a publicly traded corporation will be deemed to have "dispersed voting power" if: (1) no person, including any "group" as that term is used in the Securities Exchange Act of 1934,^{12/} has the power to control the election of more than 15 percent of the corporation's directors; and (2) no person or group, other than the corporation's management, is in control of the corporation. Section 24.709(b) in turn provides that a publicly traded corporation with dispersed voting power is not required to aggregate with its own assets and revenues the assets and revenues of the members of its management team or of its non-affiliate shareholders.

Metricom's recommendation for exempting a publicly traded corporation with dispersed voting power from the PCS C-Block

^{11/} *Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 444 (internal citation omitted).

^{12/} Section 13(d) and Section 13(g) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d) and (g), as amended, state that "when two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person'" and therefore is required to make the disclosures indicated in those subsections.

attribution rules was based on the theory that: (1) to the extent such a corporation is controlled by any group, it is controlled by its management; (2) its management, either individually or as a group, does not possess a controlling stock interest in the corporation; and (3) its non-affiliate shareholders, by reason of management control, do not control the corporation; therefore, the wealth of the individual members of management and non-affiliate shareholders is not relevant to a determination of whether the corporation meets the applicable size requirements.

This theory is of general applicability; it is not limited by any circumstances special to the PCS C-Block auction. For small businesses, simply having publicly traded stock does not guarantee a robust market for acquiring sufficient capital to exploit new and unproven technologies. These small businesses, just like privately held small businesses, still have need for some preference vis-a-vis large corporations. At the same time, Metricom's proposal is sufficiently restrictive to exclude from its scope those corporations with respect to which the attribution of shareholder revenues and assets would be appropriate for determining eligibility.

III. Conclusion

For the reasons discussed herein, Metricom recommends that the Commission extend the small business eligibility criteria for publicly traded corporations contained in Sections 24.709(b)(2) and 24.720(m) of the Commission's rules to all services. Failure

to do so could very likely penalize corporations that choose to raise capital in the public markets rather than through private placements and would impose an unnecessary hardship on publicly traded corporations that would otherwise qualify for small business status under the Commission's rules.

Respectfully submitted,

METRICOM, INC.

By: Henry M. Rivera (TC)
Henry M. Rivera
Larry S. Solomon
M. Tamber Christian
GINSBURG, FELDMAN & BRESS, CHTD.
1250 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
202-637-9000

Its Attorneys

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